

PUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Need For Secrecy

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No. 86-5008

~~UNITED STATES OF AMERICA,~~

Plaintiff-Appellee,

v.

~~SAMUEL LORING MORISON,~~

Defendant-Appellant

THE WASHINGTON POST; CBS, INC.;
NATIONAL BROADCASTING COMPANY, INC.;
CAPITAL CITIES/ABC, INC.; TIME, INC.;
NEWSWEEK; U.S. NEWS & WORLD REPORT;
THE WALL STREET JOURNAL; THE NEW YORK
TIMES; THE NEW YORK DAILY NEWS; THE
LOS ANGELES TIMES; THE CHICAGO TRIBUNE;
THE BOSTON GLOBE; THE ATLANTA JOURNAL
AND CONSTITUTION; THE MIAMI HERALD; THE
DALLAS MORNING NEWS; THE MINNEAPOLIS
STAR AND TRIBUNE; OTTAWAY NEWSPAPERS, INC.;
THE ASSOCIATED PRESS; NATIONAL PUBLIC RADIO;
PULITZER BROADCASTING COMPANY; THE AMERICAN
SOCIETY OF NEWSPAPER EDITORS; THE AMERICAN
NEWSPAPER PUBLISHERS ASSOCIATIONS; THE
AMERICAN BOOKSELLERS ASSOCIATION, INC.;
ASSOCIATED PRESS MANAGING EDITORS; THE
MAGAZINE PUBLISHERS ASSOCIATION; THE
NATIONAL ASSOCIATION OF BROADCASTERS; THE
NEWSPAPER GUILD; THE RADIO-TELEVISION
NEWS DIRECTORS ASSOCIATION; THE REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS; THE
SOCIETY OF PROFESSIONAL JOURNALISTS AND
PUBLIC CITIZEN; WASHINGTON LEGAL FOUNDATION;
THE ALLIED EDUCATION FOUNDATION,

Amici Curiae

Appeal from the United States District Court for the District of
Maryland, at Baltimore. Joseph H. Young, District Judge. (CR-84-
455-y)

Argued: October 8, 1987

Decided: April 1, 1988

Before RUSSELL, PHILLIPS, and WILKINSON, Circuit Judges.

RUSSELL, Circuit Judge:

The defendant is appealing his conviction under four counts of an indictment ~~for violation of 18 U.S.C. § 641, and of two provisions of the Espionage Act, 18 U.S.C. § 793(d) and (e).~~ The violations of the Espionage Act ~~involved the unauthorized transmittal of certain satellite-secured photographs of Soviet naval preparations to "one not entitled to receive them" (count 1) and the obtaining of unauthorized possession of secret intelligence reports and the retaining of them without delivering them to "one entitled to receive" them (count 3).~~ Counts 2 and 4 of the indictment charged violation of the theft provisions of 18 U.S.C. § 641. His defense was essentially that the statutes did not encompass the conduct charged against him and, if they did, the statutes were unconstitutional. At trial, he also found error in certain evidentiary rulings by the district judge. ~~We find the claims of error unfounded and affirm the conviction.~~

I.

Summary of the Facts

The defendant was employed at the Naval Intelligence Support Center (NISC) at Suitland, Maryland from 1974 until October, 1984. At the time of the incidents involved in this prosecution, he was assigned as an amphibious and hospital ship and mine warfare analyst in the NISC and as such had been given a security clearance of "Top Secret-Sensitive Compartmented Information." His work place was in what was described as a "vaulted area," closed to all persons without a Top Secret

WILKINSON, Circuit Judge, ~~concurring~~:

~~I concur in Judge Russell's opinion.~~ I believe his analysis of the relevant statutes, instructions, and evidentiary rulings is both careful and correct.

Morison's constitutional challenge is specifically phrased in terms of notice, statutory vagueness, and overbreadth. Yet much of the argument in this case has been cast in broader terms. Amici, The Washington Post, et al., warn that this case "will affect, and perhaps dramatically alter, the way in which government officials deal with the press, the way in which the press gathers and reports the news, and the way in which the public learns about its government." The news organizations are necessarily raising their concerns as amici, not as parties. No member of the press is being searched, subpoenaed, or excluded, as in a typical right of access case. Morison as a source would raise newsgathering rights on behalf of press organizations that are not being, and probably could not be, prosecuted under the espionage statute.

Perhaps because these press rights of access are not personal to Morison, we have thus been asked to import a weighty assortment of First Amendment values into Morison's notice, vagueness, and overbreadth claims. Although this is more freight than the Supreme Court has lately allowed these doctrines to carry, I would assume for purposes of this discussion that Morison is entitled to raise the serious claims urged by the

press amici. Indeed, I cannot fully express my own view of this case without addressing these claims, not as unspoken aspects of a vagueness and overbreadth analysis, but directly and on their own terms.

I.

I do not think the First Amendment interests here are insignificant. Criminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity. There exists the tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself. Public debate, however, is diminished without access to unfiltered facts. As James Madison put it in 1822: "A popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." 9 Writings of James Madison 103 (G. Hunt ed. 1910). We have placed our faith in knowledge, not in ignorance, and for most, this means reliance on the press. Few Americans are acquainted with those who make policy, fewer still participate in making it. For this reason, the press provides the "means by which the people receive that free flow of information and ideas essential to effective self-government." Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

~~The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words "national security."~~ National security is public security, not government security from informed criticism. No decisions are more serious than those touching on peace and war; none are more certain to affect every member of society. Elections turn on the conduct of foreign affairs and strategies of national defense, and ~~the dangers of secretive government have been well documented.~~ Morison claims he released satellite photographs revealing construction of the first Soviet nuclear carrier in order to alert the public to the dimensions of a Soviet naval buildup. Although this claim is open to serious question, the undeniable effect of the disclosure was to enhance public knowledge and interest in the projection of Soviet sea power such as that revealed in the satellite photos.

~~The way in which those photographs were released, however, threatens a public interest that is no less important -- the security of sensitive government operations.~~ In an ideal world, governments would not need to keep secrets from their own people, but in this world much hinges on events that take place outside of public view. ~~Intelligence gathering is critical to the formation of sound policy, and becomes more so every year with the refinement of technology and the growing threat of terrorism.~~ Electronic surveillance prevents surprise attacks by hostile forces and facilitates international peacekeeping and arms control efforts. Confidential diplomatic exchanges are the essence of international relations.

~~None of these activities can go forward without secrecy. When the identities of our intelligence agents are known, they may be killed. When our electronic surveillance capabilities are revealed, countermeasures can be taken to circumvent them. When other nations fear that confidences exchanged at the bargaining table will only become embarrassments in the press, our diplomats are left helpless. When terrorists are advised of our intelligence, they can avoid apprehension and escape retribution. See generally Note, 71 Va. L. Rev. 801, 801-03 (1985) (citing numerous leaks that have compromised a major covert salvage operation, exposed the development of the secret Stealth aircraft, and stymied progress on an international treaty). The type of information leaked by Morrison may cause widespread damage by hampering the effectiveness of expensive surveillance systems which would otherwise be expected to provide years of reliable information not obtainable by any other means?~~

~~Public security can thus be compromised in two ways: by attempts to choke off the information needed for democracy to function, and by leaks that imperil the environment of physical security which a functioning democracy requires. The tension between these two interests is not going to abate, and the question is how a responsible balance may be achieved.~~